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CITATIONS

071779—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 502

ANGELO DI ORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 131–137) is reported at 150 F. 2d 931.

JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1945 (R. 138), and a petition for rehearing was denied September 8, 1945 (R. 143). The petition for a writ of certiorari was filed October 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was sufficient independent evidence of the corpus delicti to corroborate incriminating admissions made by petitioner at the time of his arrest.

STATEMENT

An indictment in five counts was returned against petitioner and others in the United States District Court for the District of New Jersey, charging (1) a conspiracy to violate the internal revenue laws relating to distilleries, (2) possession of an unregistered still, in violation of 26 U. S. C. 2810 (a), (3) unlawfully engaging in the business of a distiller with the intent to defraud the United States of taxes, in violation of 26 U. S. C. 2833 (a), (4) making and fermenting mash in a building not then a distillery, in violation of 26 U. S. C. 2834, and (5) concealing spirits on which the tax had not been paid with intent to defraud the United States of such tax, in violation of 26 U. S. C. 3321 (a) (R. 4–11). Petitioner and a codefendant, Pawlowski, were convicted on all counts (R. 2). Petitioner was sentenced to imprisonment for two years on count 1, and one year and one day on each of counts 2, 3 and 4, the sentences to run consecutively; and three years on count 5, to run concurrently with the prison terms imposed on counts 1 and 2. He

was also sentenced to pay fines and penalties totalling $5,000. (R. 2–3.) On appeal, the judgment was affirmed (R. 138).

The evidence for the Government may be summarized as follows:

On April 26, 1944, at about 3:45 P. M., federal alcohol agents and state officers discovered a set-up still in a barn on a farm owned by Mrs. Carkhuff (R. 12–13, 15–16, 19–20, 37–38).[1] In the barn were cans of alcohol and wooden vats filled with mash (R. 16, 18, 38). The still was supplied by the same water system which furnished water to the farm dwelling. There was a new electric motor and a new pump which had been supplied without cost to the Carkhuffs and installed by the defendant Pawlowski (R. 34–35, 94).

After discovering the still, the agents concealed their cars and remained in hiding (R. 20). At about 6:00 P. M. Pawlowski drove up to the still and was arrested (R. 20, 39). At about 9:30 P. M. a car was observed coming down the main road toward the farm. When it neared the lane leading to the farm, the head lights were extinguished and the car could be heard approaching the farm. It was driven past several small barns to a spot about ten feet away from the still. (R. 24, 39.) As petitioner, the driver of the car,

[1] Mrs. Carkhuff and her two sons were also indicted as co-conspirators (R. 5). The trial was severed as to Mrs. Carkhuff, and the two sons were acquitted (R. 2).

opened the door, the agents rushed up and told him to put up his hands. He said, "All right, you got me. Let's get it over with" (R. 26, 40). Petitioner was taken to the farm house by several of the agents. One of them said to him, "Slim, isn't this the first time you ever came into one of your stills?" and petitioner replied, "Yes, God damn it, this is the first time. I ought to have my head examined." (R. 26–27, 41.) Petitioner told another agent, "Well, I guess that is another feather in your hat" (R. 50). After petitioner had been held for a time, he said, "Let us go, there won't be any more men here tonight" (R. 51).

ARGUMENT

Petitioner's contention that his conviction is based upon his admissions alone, unsupported by independent proof of the corpus delicti (Pet. 10–14), seems to rest on the assumption that the corroborative proof must in itself establish guilt beyond a reasonable doubt. It is, however, well established that the independent evidence of the corpus delicti need not be "so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt." *Jordan* v. *United States,* 60 F. 2d 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633; see also *Evans* v. *United States,* 122 F. 2d

461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States,* 94 F. 2d 236, 240 (App. D. C.). And, as the court below pointed out (R. 134), "proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *George* v. *United States,* 125 F. 2d 559, 563 (App. D. C.); *Anderson* v. *United States,* 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *United States* v. *Marcus,* 53 Fed. 784, 786 (C. C. S. D. N. Y.), error dismissed, 159 U. S. 259.[2]

Judged by these standards, it is clear that there was sufficient evidence of the corpus delicti of each of the crimes charged in the indictment. As to the substantive offenses, the existence of the still, the presence of illegal mash and of untaxpaid spirits, were established by the independent evidence of the officers who made the raids. Petitioner argues (Pet. 13–14) that there was no proof of intent to defraud, an element of the offenses charged in counts 3 and 5, or of the fact that the defendants were "carrying on the business of a distiller," an element of the offense

[2] The statement in *Hancey* v. *United States,* 108 F. 2d 835 (C. C. A. 10), which petitioner quotes (Pet. 10) is dictum, contrary to the great weight of authority.

charged in count 3. Manifestly, however, such elements of the offenses may be, and in most instances necessarily must be, established by circumstantial evidence. See *One 1941 Ford ½ Ton Pickup A Truck, Etc.* v. *United States,* 140 F. 2d 255, 257 (C. C. A. 6). The circumstances under which the still here involved was found amply justify the inference that the still was an illicit one, used to carry on a business with the intent to defraud the United States of taxes. Cf. *Scott* v. *United States,* 145 F. 2d 405 (C. C. A. 10), certiorari denied, 323 U. S. 801; *United States* v. *David,* 107 F. 2d 519 (C. C. A. 7); *Weeke* v. *United States,* 14 F. 2d 398 (C. C. A. 8), certiorari denied, 273 U. S. 662.

As to the conspiracy count, evidence that the still was concealed in a barn on the Carkhuff farm, that Pawlowski was arrested at the still, that the pump which supplied water to the still and the farm house was supplied without cost to the Carkhuffs and installed by Pawlowski, was enough to suggest that the still was operated pursuant to the agreement of more than one person. It was thus sufficient to constitute independent proof of an agreement, the corpus delicti of a conspiracy charge. Petitioner contends (Pet. 11–13) that his knowledge of the existence of the conspiracy is also an element of the corpus delicti which must be proved independently, on the principle enunciated in *Forte* v. *United States,* 94 F.

2d 236 (App. D. C.), that, where scienter is an element of the offense, it must be established by independent evidence. However, the crime charged in the *Forte* case was the transportation of stolen property knowing it to be stolen, a type of crime in which proof of scienter itself may be thought to require proof of the identity of the perpetrator of the crime. But in conspiracies, the corpus delicti is merely the agreement between two or more persons, and proof of knowledge of the agreement on the part of a particular defendant is a matter bearing only on the separate question of his identity as one of the conspirators. Petitioner's knowledge of the existence of the conspiracy could therefore be proved by his admissions alone. *Anderson* v. *United States,* 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635. Moreover, even if independent proof of petitioner's knowledge was required, that fact was independently established by testimony showing that petitioner was sufficiently familiar with the premises where the still was kept to drive to it past several buildings at night without headlights.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit

that the petition for a writ of certiorari should be denied.

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